No. 17-1717, No. 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*, *Petitioners*,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Petitioner*,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AMERICAN JEWISH COMMITTEE, CENTRAL CONFERENCE OF AMERICAN RABBIS, EVANGELICAL LUTHERAN CHURCH IN AMERICA, GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST, AND REVEREND DR. J. HERBERT NELSON, II, AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This brief addresses two questions:

1. Whether government may display a massive Latin cross in the center of a major intersection?

2. Whether, if the Court were to permit government to continue displaying a cross that has been in place for many decades, the opinion should be written in a way that does not authorize government to erect new crosses?

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INTEREST OF AMICI

Amici are Christian and Jewish organizations who respect the profound theological significance of Christianity's Latin cross. They therefore reject petitioners' claim that the cross has a predominantly secular meaning. For the Christian amici, petitioners demean the most sacred symbol of the faith. For the Jewish amici, petitioners wholly fail to rationalize government sponsorship of an exclusionary and exclusively Christian symbol. Adherents of both faiths are harmed when government violates its fundamental obligation to remain neutral between religions.

Descriptions of individual amici are in the Appendix.[1]

INTRODUCTION

This case squarely presents for the first time whether government can sponsor the most fundamental, most sacred, and most exclusively Christian of all religious symbols: the Latin cross. Whenever in this brief we refer to the cross, we mean the Latin cross—the cross that most closely resembles the cross of the crucifixion, the cross that is instantly recognized as the preeminent symbol of Christianity.

Using the cross to honor our nation's war dead reflects either the erroneous assumption that our military is comprised entirely of Christians, or the equally erroneous assumption that the most sacred symbol of Christianity somehow honors non-Chris-

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[1] This brief was prepared and funded entirely by amici and their counsel. Blanket consents are on file with the Clerk.

tians as well. But the reason the cross honors the Christian war dead is that for Christians, it symbolizes the promise of eternal life. And in one widely known understanding of Christianity—an understanding the Commission cannot effectively disclaim—failure to accept God's offer of salvation through Christ leads to eternal damnation. Petitioners' claim that the cross has a predominantly secular meaning would desacralize the most sacred symbol of Christianity.

SUMMARY OF ARGUMENT

I. A government-sponsored cross takes sides on competing claims to religious truth.

A. The cross symbolizes the central Christian story of Christ's death and resurrection, and for Christians, it symbolizes God's gift of Jesus, who died on a cross and rose from the dead, offering the promise of eternal life. The cross's secondary meaning to honor the Christian dead is based on this promise of eternal life. It is not a secular meaning of the cross, but an application of the religious meaning. Petitioners have no other theory of how the cross came to honor the Christian dead.

Petitioners' welter of alleged secular meanings for the cross, and their efforts to minimize its religious meaning, are offensive to many Christians. The Commission violates its obligation to be neutral among faiths both when it sponsors the cross and when it spins stories attempting to secularize the cross.

B. On one widespread reading of Christian scriptures, the promise of eternal life is only for Christians. It comes with explicit threats of damna-

tion for non-Christians. These Christian teachings are widely known, most famously from *John* 3:16. This widespread interpretation makes it impossible for the cross to honor non-Christian soldiers.

C. This case does not turn on the *Lemon* test, which requires government to be neutral between religion and non-religion. It turns on government's much more fundamental obligation to remain neutral between religions. As Justices of all persuasions have explained, that obligation extends to government speech endorsing particular religious teachings, at least on points where the three Abrahamic religions disagree.

D. No earlier decision of this Court upheld a government display so purely and profoundly sectarian as the Latin cross. The constitutionality of the cross was not presented in *Salazar v. Buono*, and plaintiff there did not brief the meaning of the cross. In all other cases, the Court found either substantial secular elements or good-faith efforts to represent multiple faiths. Neither is present here.

E. To hold that government cannot sponsor a freestanding cross does not imply the removal of every cross from every government venue. Most obviously, privately chosen religious symbols on individual tombstones are plainly constitutional.

II. Government's obligation to be neutral between competing claims to religious truth is deeply rooted in the original public meaning. The founding generation agreed that government is not a competent judge of religious truth and that it should stay out of religious controversies. But the relevant religious controversies were controversies among Protestants.

Important government-sponsored Protestant practices continued until well after the large Catholic immigration in the mid-nineteenth century. These government-sponsored practices were often coercive; coercion was not the test. To hold that government today can do anything that early generations of Americans did would turn the First Amendment into a Protestant capture. The principle of keeping government out of religious controversies remains the same, but what is religiously controversial has changed as religious diversity has increased.

III. The Court should not adopt any of petitioners' secular rationalizations for the cross, their vague excessive-proselytizing test, or their anything-goes historical test. Any of these rationales would give governments carte blanche to erect new crosses. Taking longstanding crosses down may be religiously divisive; putting new government crosses up would certainly be religiously divisive.

If the Court is unwilling to order the Bladensburg cross removed, it should say that longstanding religious symbols can sometimes remain as vestiges of past establishments. When the formally established churches were disestablished, they were generally allowed to keep the fruits of their earlier establishment, most notably the property acquired with government funds. If the Bladensburg cross is allowed to remain, the sole reason should be that it is grandfathered.

ARGUMENT

I. The Bladensburg Cross Violates Government's Obligation to Be Neutral Between Competing Religious Teachings.

The Latin cross at issue stands in splendid isolation, forty-feet high, in a traffic island in a busy intersection. See J.A. 40-41 (photographs). Some drivers and passengers presumably know that the cross was built as a memorial to soldiers killed in war; many undoubtedly do not. The various markings that are said to secularize this cross, and the much smaller secular memorials to the dead of other wars, separated from the cross by four lanes of traffic, *id.* at 44, are mostly invisible to those viewing the cross from the roadway. Even when someone notices some of these secular addenda, they are tiny compared to the much larger cross that dominates the scene. What all drivers and passengers see is the preeminent symbol of Christianity standing all alone in the public right of way.

This cross violates government's fundamental obligation to remain neutral between competing religious teachings, with resulting harms to Christians and non-Christians alike.

A. Petitioners' Allegedly Secular Rationalizations for the Cross Would Desacralize the Most Sacred Symbol of Christianity.

Petitioners systematically seek to secularize the cross and to minimize its religious significance. They would desacralize what to Christians is the most precious symbol of the central promise of their faith: "that whosoever believeth in him should not perish, but have everlasting life." *John* 3:16.

Petitioners claim that the "objective meaning" of the cross is not Christ's sacrifice on the cross, and not the Christian promise of resurrection, but "to commemorate war dead and to honor the Nation's veterans." Comm'n Br. 34. The cross "has a ubiquitous and well established meaning of commemorating military valor," *id.* at 21; it is no different from "any other secular war memorial." Legion Br. 60. The Bladensburg cross also has "a secondary meaning as a historic landmark." Comm'n Br. 34. It is an early example of concrete art. *Id.* at 42. It is "plainly secular." *Id.* at 50. It serves merely "to encourag[e] the recognition of what is worthy of appreciation in society." *Id.* at 57 (alteration by Commission).

For petitioners, few symbols are "exclusively religious," and "*least of all the cross.*" *Id.* at 36 (emphasis added). Petitioners would thus reduce the cross from the most fundamental and most sacred Christian symbol to the least of religious symbols. And the cross is no longer a symbol of God's promise to Christians; it is "a *universal* symbol." *Id.* at 35 (emphasis added); *see also id.* at 23 (analogizing cross to symbols of "pluralism").

Petitioners are so determined to bury the true meaning of the cross that the name of Jesus Christ does not appear in their briefs, except for one case name and two quotations from the court of appeals, quotations the Commission promptly repudiates. *Id.* at 15-16; Legion Br. 23 n.7. Over and over, petitioners describe the cross as merely a memorial in "the shape of a cross," and similar circumlocutions, as though shape in this case were some incidental characteristic of little importance. Comm'n

Br. i, 2, 5, 6, 8, 11, 14, 15, 19, 20, 21, 28, 36, 49, 50, 52, 57; Legion Br. i, 3, 5, 56.

The United States carries these denials to the most extreme lengths. It contends that the "relevant inquiry" is not whether the cross's secular addenda "somehow 'neutralize[]' the cross's otherwise religious message." For the United States, the question is whether, in light of its "secular context," a reasonable observer "would view the cross as a religious display *in the first place*." U.S. Br. 32 (emphasis and alteration by United States). And remarkably, the United States appears to answer no to that question. *Id.*

Every observer of the cross inevitably sees it "as a religious display in the first place," no matter how well informed the observer may be about the Commission's claim that the cross *also* conveys an allegedly secular message. To claim otherwise is absurd.

For Christians who think seriously about the events and message that the cross represents, instead of focusing only on the short-term "gain" of preserving a prominent government-sponsored symbol of their faith, petitioners' claims are deeply offensive. They subordinate what the cross means to millions of faithful Christians in a welter of transparent secular rationalizations.

There is no ambiguity about the primary, predominant, and objective meaning of a Latin cross. The cross is *the* central symbol of Christianity, invoking *the* central theological claim of Christianity: that the son of God died on the cross, that he rose from the dead, and that his death and resurrection offer the possibility of eternal life. Christianity is

what one encountering this cross thinks of "in the first place," and the aggressive rationalizations of petitioners' version of the reasonable observer cannot change this obvious and dominant meaning.

The cross's secondary meaning to honor the Christian war dead derives from, and depends on, this primary meaning. The secondary meaning would make no sense without the primary meaning. Certainly a cross on a grave says that a Christian is buried here. More fundamentally, Christians mark graves with crosses because the cross symbolizes the promise of eternal life. To say that the cross honors the Christian war dead does not identify a secular meaning of the cross; it merely identifies a common application of the religious meaning. The claim that the cross honors "sacrifice and martial valor," Comm'n Br. 34, is equally derivative. If the cross honors sacrifice, it is because it symbolizes Christ's sacrifice on the cross.

The court of appeals noted the deeply religious derivation of how the cross came to be used to honor the Christian dead. Pet. App. 18-18 at 20a-21a. The Commission summarily denies this derivation, Comm'n Br. 35, without explanation, and with no alternative theory of why the cross is used to mark Christian graves or honor the Christian dead.

The Commission offers no alternative explanation because none is possible. The cross as a symbol makes no sense apart from the crucifixion, the resurrection, and Christianity's promise of eternal life. The Latin cross was not arbitrarily chosen to honor the dead; it is not just an elongated plus sign. If that were all, a division sign would work as well. The

cross honors the Christian dead because it promises resurrection.

Neither the Commission nor the Court can take a position on whether these Christian teachings are true, or whether they are the best interpretation of Christianity. But neither can the Commission or the Court offer some other explanation of the cross, in which these widely known Christian teachings are subordinated and reduced to irrelevance. The cross is not a secular symbol, and neither the Commission nor the Court can make it so. The Commission violates its obligation to be neutral among religious teachings when it sponsors the cross and again when it spins stories attempting to secularize the cross.

B. The Latin Cross Is a Uniquely Sectarian Symbol.

The cross honors deceased Christians—and only Christians. To claim that it also honors non-Christians at the very least associates them in death with a religion they did not believe in life. This alone can be a source of deep grievance. Compare the long-standing Jewish complaints about posthumous baptisms, which continue despite efforts by the Mormon leadership to end the practice.[2] Claiming that the cross honors non-Christians makes the violation worse instead of better.

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[2] Mark Oppenheimer, *A Twist on Posthumous Baptisms Leaves Jews Miffed at Mormon Rite*, N.Y. Times (March 2, 2012); Josefin Dolsten, *Mormons are baptizing Holocaust victims, Lubavitcher rebbe and relatives of celebrities, researcher says*, Jewish Telegraphic Agency (Dec. 22, 2017), https://www.jta.org/2017/12/22/united-states/mormons-are-baptizing-jewish-holocaust-victims-lubavitcher-rebbe-and-celebrities-researcher-says [https://perma.cc/EZ5H-EFBY].

Beyond that, differences between Christianity and other faiths run deep. Jews do not reject just the idea that Jesus was the Messiah. They have long rejected the idea that God could have a son or a physical body that could die a physical death. Maimonides, in his famous *Thirteen Principles of the Faith*, insisted on the absolute unity and absolute incorporeality of God,[3] and those teachings reappear in many other Jewish texts.[4] These Jewish teachings are wholly inconsistent with the Christian teaching that the son of God died on the cross.

Most troubling of all, on one widely known understanding of Christianity, the cross symbolizes the threat that non-Christians are damned. This view is most prominently associated with Protestant Evangelicals, who emphasize the need "to trust and receive Jesus Christ as Lord and Savior."[5] Evangelicals are the largest group of Christians in the United States,[6] so their understanding of Christianity is widely known. Because the Commission cannot take

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[3] *Maimonides' Thirteen Principles of the Faith* (Second and Third Principles), most readily available at http://www.js.emory.edu/BLUMENTHAL/Maimonides%27%20Principles%20(DRB)%20.pdf [https://perma.cc/2D3W-2AQR].

[4] *See* Daniel J. Lasker, *Jewish Philosophical Polemics Against Christianity in the Middle Ages* 105-06 (2d ed. 2007).

[5] *E.g.*, Billy Graham Evangelistic Association, *Steps to Peace*, https://stepstopeace.org/ [https://perma.cc/4TLZ-VX7L] (explaining that we are separated from God by sin and that only the cross can "bridge" this gap and "reach[] God").

[6] Pew Research Center, *America's Changing Religious Landscape* 4 (2015). The full report is available from a link at http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/98NS-85UH].

positions on competing faith claims, it cannot disclaim this widespread understanding of the symbol it displays.

This understanding of Christianity is reflected in a Bible verse much publicized by Evangelicals:

> For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.

John 3:16. This promise is explicitly open to all—"whosoever." But one must believe the Christian story to claim the promise. The threat is made explicit two verses later:

> He that believeth on him is not condemned: but he that believeth not is condemned already, because he hath not believed in the name of the only begotten Son of God.

John 3:18.[7] Both the promise and the threat are explicitly tied to the cross.[8]

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[7] *See also, e.g., Mark* 16:16 ("He that believeth and is baptized shall be saved; but he that believeth not shall be damned."); *John* 14:6 ("I am the way, the truth, and the life: no man cometh unto the Father, but by me."); *Acts* 4:12 ("Neither is there salvation in any other"); *2 Thessalonians* 1:7-9 ("the Lord Jesus shall be revealed from heaven with his mighty angels, In flaming fire taking vengeance on them that know not God, and that obey not the gospel of our Lord Jesus Christ: Who shall be punished with everlasting destruction from the presence of the Lord"). All quotations are from the King James Version.

[8] *1 Corinthians* 1:18 ("For the preaching of the cross is to them that perish foolishness; but unto us which are saved it is the power of God.").

On this version of Christian teaching, some humans get the promise, and other humans get the threat. The cross divides the world between the saved and the damned. That alone makes it impossible for the cross to commemorate non-Christians.

C. Government Must Be Neutral As Between Religious Teachings, Even in Its Endorsements.

1. This case does not turn on the *Lemon* test, which requires government to remain neutral between religion and non-religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). This case turns on government's much more fundamental obligation to remain neutral between competing religious teachings. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); *Larson v. Valente*, 456 U.S. 228, 244 (1982). Every Justice has subscribed to this requirement of neutrality between faiths.[9] And the Court has unanimously reaffirmed that government may not "lend[] its power to one or the other side in controversies over religious authority or dogma." *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 190 (2012) (quoting *Employment Division v. Smith*, 494 U.S. 872, 877 (1990)).

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[9] *See Trump*, 138 S. Ct. at 2417 (Roberts, C.J., for the Court); *id.* at 2434 (Sotomayor, J., dissenting); *Town of Greece v. Galloway*, 572 U.S. 565, 619 (2014) (Kagan, J., dissenting); *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) (Kavanaugh, J., for the court).

Justices Scalia and Thomas have defended government support of religion as strongly as any Justice, and more strongly than most. Yet they repeatedly said that this support must be neutral among faiths. It must exclude details upon which monotheists disagree. And they said that this requirement applies not just to what the government coerces, but also to what it endorses:

> [O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion—even when no legal coercion is present, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting). Justice Thomas and Chief Justice Rehnquist joined this opinion.

These Justices would have permitted government to display the Ten Commandments, but only because the Commandments were common to all three of the principal monotheistic religions in the United States. *McCreary County v. ACLU*, 545 U.S. 844, 893-94 (2005) (Scalia J., dissenting). They insisted that the Founders had clearly rejected government endorsements of Christianity. *Id.* at 897. "*All* of the actions of Washington and the First Congress upon which I

have relied, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government's favoring religion that I have cited, have invoked God, but not Jesus Christ." *Ibid* (emphasis in original). Justice Thomas and Chief Justice Rehnquist also joined this opinion.

These opinions relied on the words and actions of the leaders of the federal government. Not all early Americans were so attentive to the rights and needs of religious minorities. *See infra* 27-30. But these opinions were right about the central point: government cannot promote the truth of any one religion. And as these opinions showed, important American leaders appear to have understood this from the beginning.

The cross fails each of Justice Scalia's and Justice Thomas's tests. It is unique to Christianity, not common to the three Abrahamic religions. Its power as a symbol, and the story it symbolizes, are all about Jesus Christ. It was Christ who died on the cross, it is Christ whom Christians believe rose from the dead, and it is through this unique event that Christians believe that God offers eternal life. The cross cannot be separated from Jesus Christ, or from the divinity of Jesus Christ, whom Christians confess to be God.

2. Despite its failed efforts to secularize the cross, the Commission necessarily endorses this Christian message when it displays a large free-standing cross. "Governments have long used monuments to speak to the public." *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). "It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a

message with which they do not wish to be associated." *Id.* at 471. Government cannot display the cross and somehow dissociate itself from the primary meaning of the cross. The Bladensburg cross inevitably promotes the Christian story of the cross.

That endorsement is inconsistent with core principles of the Establishment Clause, as this Court unanimously recognized in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). The Court said that even a temporary cross at Easter would convey "endorsement of Christianity." *Id.* at 599. The dissenters took no position on that. But they agreed that "the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. ... Such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 661 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and White and Scalia, JJ.)

The Bladensburg cross is "permanent." It is "year-round." It is "large." It is "obtrusive." Its "obvious" message is uniquely Christian. The difference between the roof of city hall and the right of way of a major intersection changes nothing.

The cross cannot be rescued by the claim that it also honors soldiers killed in war, when it honors only Christian soldiers and when it honors them only because of the religious message that it symbolizes—the message of the resurrection.

When a symbol has a primary meaning so fundamental, so longstanding, and so universally known as Christianity's Latin cross, government cannot display the symbol and plausibly disclaim the primary

meaning. When the allegedly secular secondary meaning is wholly derivative from the primary religious meaning, government cannot embrace the secondary meaning without embracing the primary meaning on which the secondary meaning depends. If this Court says that a Latin cross is predominantly secular, then words and symbols have no meaning and the Court has consigned the Establishment Clause to the world of *Alice in Wonderland*.

3. The rule that government cannot endorse particular religions or religious teachings does not create "Tension Within the First Amendment." Legion Br. 42. Properly understood, the amendment fits together perfectly well. It protects private-sector speech, religious or secular, by prohibiting regulation of *private* speech on the basis of content or viewpoint. And it protects private-sector religion by prohibiting *government* speech that takes sides on disputed religious questions.

Government can speak on secular matters because the principal point of political debate is to influence government, and government can try to lead public opinion on political issues. *Lee v. Weisman*, 505 U.S. at 591. Otherwise, government could not function. *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

But Americans do not vote on religion, and government does not lead public opinion on religion. Government therefore has no need to speak on religious issues, and it cannot do so without taking sides between and within faiths. Because government is highly visible, and because its speech about religion is always heavily influenced by political motives, it cannot speak about religion without influencing and

usually distorting the religious teachings it tries to promote—and implicitly or explicitly rejecting the religious teachings it does not promote. We best protect religion from the corrosive and divisive effects of government interference by keeping government out of religious questions.

4. Government sponsorship of the cross cannot be rationalized on the ground that non-Christians are few in number. That is not how individual rights work. And factually, non-Christians are not so few. The most recent large-scale survey is the Pew Research Center's sample of 35,000 Americans. Only 70.6% of Americans now say that their religion is Christian or any more specific group identifiable as Christian.[10] This number has steadily declined from 78.4% in another massive survey in 2007[11] and from 86.2% in an even larger survey in 1990.[12]

Of course, 70% is a supermajority. But 30% is a huge minority. There are more than 328 million Americans;[13] 29.4% means that nearly 100 million Americans do not self-identify as Christians. The cross does not honor their war dead. For them, the cross represents a religious teaching that would condemn them to damnation.

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[10] Pew Research Center, *supra* note 6, at 4.

[11] *Ibid.*

[12] Barry A. Kosmin & Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* 2-3 (1993).

[13] U.S. Census Bureau, *Population Clock*, available at www.census.gov [https://perma.cc/8F3Z-NXT7].

D. No Earlier Decision Authorizes What Petitioners Seek Here.

No decision of this Court authorizes government display of a symbol so uniquely sectarian, so purely and profoundly religious, as the Latin cross.

Petitioners rely on dictum in the plurality opinion in *Salazar v. Buono*, 559 U.S. 700 (2009). But the issues in *Buono* were claim preclusion, standing, privatization as a remedy, and whether changed circumstances justified modification of the district court's injunction. The constitutionality of the cross was not at issue, and plaintiff's brief did not discuss either constitutionality or the meaning of the cross. The plurality's dictum about the use of the cross to honor the war dead did not consider, and had no occasion to consider, whether that use was an independent secular meaning or merely an application of the religious meaning.

Petitioners also rely on *Van Orden v. Perry*, 545 U.S. 677 (2005), upholding a government display of the Ten Commandments. But the cross is exclusively Christian; the Ten Commandments are common to the three Abrahamic faiths. The cross is purely religious; the Commandments contain secular elements not wholly derived from their religious origin. They contain prohibitions on murder, theft, perjury, and defamation—secular wrongs prohibited in the law of every civilization. *See id.* at 690 (plurality); *id.* at 701 (Breyer, J., concurring in the judgment).

After denying that the use of the cross to honor the Christian dead derives from the cross's religious meaning, *supra* at 8, the Commission claims the opposite for the Commandments. It asserts, again with

no hint of explanation, that the Commandments' "meaning as a symbol of law derives entirely from its religious origins." Comm'n Br. 36. But that is far less true of the Commandments than of the cross. No doubt the claim of divine origin for the Commandments heightens their symbolic power. But artists and architects can symbolize law with an image of ten high-profile rules, widely recognized in the culture, without relying on the source of those rules. The north and south friezes in this Court's courtroom symbolize law with images of eighteen lawgivers, few of whom claimed divine inspiration from any deity that many Americans would acknowledge.[14] And millions of Americans believe that it is wrong to kill, steal, or bear false witness, without attributing these rules to a miracle on Mt. Sinai. Sponsoring a cross takes government much more deeply into purely religious matters, and much more deeply into competing claims to religious truth, than sponsoring the Commandments.

Nor is this case anything like *Town of Greece v. Galloway*, 572 U.S. 565 (2014). There the Court accepted the town's claim that it was open to prayers of all faiths and had attempted in good faith to rotate prayer-givers. *Id.* at 585; *id.* at 597 (Alito, J., concurring) ("I would view this case very differently if the omission of these synagogues were intentional."). Here, the omission of symbols of any other faith is fully intentional. *Town of Greece* would be analogous to this case only if the town had adopted a single Christ-centered prayer as the *only* prayer—to

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[14] *Courtroom Friezes: North and South Walls*, https://www.supremecourt.gov/about/northandsouthwalls.pdf [https://perma.cc/2RRQ-PKGB].

be delivered at every board meeting for a century or more.

Finally, the Court upheld a municipal Nativity scene, or crèche, accompanied by reindeer, Santa's sleigh, a clown, an elephant, colored lights, and numerous other objects. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984). Christmas has deep religious meaning, but as this incongruous collection of objects illustrates, it has suffered from commercializing and secularizing intrusions. Many Americans, of many faiths and of none, now celebrate Christmas in wholly secular ways for wholly or mostly secular reasons. The Court viewed the crèche "in the context of the Christmas season," *id.* at 679, with the crèche accompanied by "purely secular displays" and the whole conglomeration serving "commercial interests," *id.* at 685. The Christian amici do not view secular celebration of Christmas as a good thing, but it is real, and mostly driven by the constitutionally protected play of social forces in the private sector. And whatever reindeer, colored lights, and all the rest might mean, these symbols are not meaningfully derived from the religious heart of Christmas.

None of these cases come close to government sponsorship of the most profoundly and uniquely Christian symbol, the symbol of the crucifixion and the resurrection.

E. The Unconstitutionality of the Bladensburg Cross Does Not Imply the Unconstitutionality of Every Cross in Every Government Venue.

Petitioners warn that if the Bladensburg cross is unconstitutional, then so are many others. This fear

is greatly exaggerated. First, government-sponsored crosses are actually rather scarce. "[T]he cross is not commonly used as a symbol to commemorate veterans and fallen soldiers in the United States." *Trunk v. City of San Diego*, 629 F.3d 1099, 1112 (9th Cir. 2011). This conclusion was based on an extensive survey of military cemeteries and war memorials. *Id.* at 1111-16. The crosses identified in petitioners' briefs are a tiny fraction of all such memorials.

Second, many crosses on government property are constitutionally unobjectionable, even praiseworthy. The crosses on tombstones in government cemeteries are chosen by individual veterans or their families, and the government offers many other symbols for veterans of other faiths. These privately selected religious symbols on individual graves are the private speech of each veteran, or of the veteran's family.

Amici do not object to religious symbols in government cemeteries, but to government taking sides between religions and singling out only Christians for collective memorialization. When a Christian family marks a fallen soldier's grave with a cross, the meaning is religious. When government honors fallen soldiers with that same cross, or a much larger cross, the meaning is still religious.

In a few circumstances, even government may display a cross for secular reasons that are clearly and prominently communicated at the scene. A government art museum may display religious art, including paintings of the crucifixion, selected for its artistic value and not for its religious message. A public-school course on comparative religion may display crosses equally with symbols of other faiths.

But government cannot rely on allegedly secular messages that are merely derivative of the religious message, and it should not be allowed to rely on secular rationalizations that are not prominently communicated in the display itself. The display itself is the message that is actually sent to most observers, and entertaining hidden, obscure, or historical secular rationalizations invites endless ad hoc litigation.

This case is not about a museum, a curriculum, or any other secular display. The highway intersection is not a cemetery, there are no tombstones, and there is no symbol of any faith other than Christianity. There is no way this display can be understood as a neutral recognition of veterans of all faiths.

II. Government's Obligation to Remain Neutral Between Competing Religious Teachings Is Deeply Rooted in the Original Understanding.

A. Petitioners ask this Court to radically rewrite the Establishment Clause. The Commission gives lip service to government neutrality between faiths. Comm'n Br. 23. But it soon abandons that concession, claiming not just that a Christian cross is secular and neutral, *id.* at 34, but also that any historically accepted practice is constitutional, *id.* at 31-32. This historic-practice test is offered as an "independently sufficient ground" for reversal, *id.* at 31—that is, sufficient whether or not the historic practice is neutral between faiths.

The Legion would expressly abandon any requirement of neutrality, claiming that "Only a Coercion Standard Provides a Workable Approach." Le-

gion Br. 40. But a rule that government can support particular religious teachings in any way that falls short of coercion would create obviously untenable results, and the Legion backs away from its implications. Under a pure coercion test, Congress could charter the Church of the United States, or promulgate a creed, so long as no one were coerced to support the church or confess the creed. Government at any level could announce its support for religion in general, for Christianity, for a particular denomination, or for either side of any disputed religious question. As one *supporter* of the idea noted, a coercion standard means that "government may participate as a speaker in moral debates, including religious ones;" it may campaign for the idea that non-Anglicans "are damned." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132-33 (7th Cir. 1987) (Easterbrook, J., dissenting).

So the Legion proposes exceptions. It concedes that government cannot designate an official church. Legion Br. 26 n.8. And it implies that government cannot "excessively" proselytize, suggesting without explanation that excessive proselytizing is coercive. *Id.* at 15, 47, 53, 56. But proselytizing is just speech, constitutionally protected when done by private citizens. *E.g.*, *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002). Government proselytizing is just government speech endorsing some particular religion. Even government designating official churches or religious teachings, if it goes no further, is just speech endorsing that church or teaching.

The Legion offers no hint of where it might draw the line between excessive government proselytizing

and permitted government proselytizing, except for a conclusory assertion that the cross does not excessively proselytize. Legion Br. 53. But a legislative resolution designating Christianity as the state religion might quietly lie dormant after an initial round of publicity. If such an official designation is unconstitutional, as the Legion concedes, then a large permanent cross in a major intersection must also be unconstitutional. It endorses and proselytizes far more effectively.

B. Petitioners' proposed rules and exceptions are based on a superficial account of history. Many of the colonies, and some of the states, had formally established churches, all of which were disestablished between the 1770s and 1833. The nation was overwhelmingly Protestant in this period, so the debate over disestablishment focused on issues that were controversial among Protestants. First and foremost was how to finance the church. The established churches depended on tax support and sought to keep it. The dissenting churches opposed tax support for churches, even when some states offered tax support to all denominations equally, as in the general assessment bill in Virginia.[15] As the dissenting churches won this battle in state after state, it became settled that government should not financially support the religious functions of churches.

Disestablishment meant that all churches would be equal under the law. The equality of all denominations implied not only that government should not tax to support its preferred denomination, but that

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[15] Thomas E. Buckley, *Church and State in Revolutionary Virginia 1776-1787*, at 143, 175 (1977).

government should not choose a preferred denomination in the first place.

This much seems to have been universally accepted. The *narrowest* proposals for the Establishment Clause would have prohibited establishing "one religious sect or society in preference to others," "any particular denomination of religion in preference to another," or "articles of faith or a mode of worship."[16] After tax support for churches had been repealed, dissenters continued to object to any sign of government favor for the formerly tax-supported churches. Baptists and Presbyterians denounced the Virginia law incorporating the Episcopal Church as giving that church "Peculiar distinctions" and "the particular sanction of and Direction of your Honourable House."[17] The incorporation law did not regulate or coerce other churches; Virginia did not say that they could incorporate if they would first do something the state wanted. The legislature offered to pass an incorporation act for any church that wanted one,[18] but that offer was never tested. Instead, the Episcopal incorporation act was soon repealed.[19]

What churches should teach, and what individuals should believe, would be left to churches and individual conscience. It was a commonplace among

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[16] Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 880-81 (1986).

[17] Buckley, *supra* note 15, at 165; H.J. Eckenrode, *Separation of Church and State in Virginia* 121-22 (1971 reprint).

[18] Buckley, *supra* note 15, at 97.

[19] *Id.* at 170.

advocates of disestablishment that government is not "a competent Judge of Religious Truth."[20] The idea could be traced to John Locke, who said that the government's choice of religion was a product of "Ignorance, Ambition, or Superstition."[21] Both Madison and Locke noted that governments disagreed about religion just as citizens did,[22] and Locke added that believing the government's religion did not improve one's chance of salvation.[23]

C. But the early generations were slow to apply these principles to generic nonfinancial support of Protestant Christianity. We find the oft-cited religious rhetoric in the speeches of political leaders, but as Justice Scalia pointed out, national leaders generally avoided specifically Christian references. *Supra* 13-14. Petitioners say the Founders raised crosses, but their examples are mostly of private crosses and all from well before the Constitution. Comm'n Br. 45-46. The short-lived Grand Union Flag, *id.* at 46, was simply thirteen stripes appended to a British Union Jack; it did not portray a Latin cross.[24] Then the Commission leaps from before the Constitution to the late-nineteenth century, citing Civil War memorials. Comm'n Br. 46. There were more than 6,000

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[20] James Madison, *Memorial and Remonstrance Against Religious Establishments* ¶5 (1785), reprinted in *Everson v. Board of Education*, 330 U.S. 1, 67 (1947).

[21] John Locke, *A Letter Concerning Toleration* (1689), in *Second Treatise of Government and a Letter Concerning Toleration* 130 (Mark Goldie ed. 2016).

[22] *Id.* at 130; Madison, *supra* note 20, at 67.

[23] Locke, *supra* note 21, at 130.

[24] Marc Leepson, *Flag: An American Biography* 15 (2005).

of these on battlefields alone,[25] and thousands more in cities and towns all across America. Petitioners say that 134 included some kind of cross—not necessarily a Latin cross.

Far more telling than presidential rhetoric and scattered crosses, we find Protestant religious instruction in the public schools.[26] Governments avoided taking sides among Protestants with the ingenious solution of reading the King James Bible with no comment or interpretation by the teachers.[27]

But that Protestant solution did not work for the Catholic immigrants who soon began streaming in. In the mid-nineteenth century, we find Catholic children beaten, or expelled from school, for refusing to read the Protestant translation of the Bible.[28] This controversy produced mob violence and church burnings in Eastern cities, a proposed constitutional amendment, and a major political issue that recurred for decades.[29] Under changed social condi-

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[25] American Battlefield Trust, *10 Facts: Civil War Battlefield Markers, Monuments, and Tablets*, https://www.battlefields.org/learn/articles/10-facts-civil-war-battlefield-monuments-markers-and-tablets [https://perma.cc/2KW7-JKUN].

[26] John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 297-305 (2001).

[27] *Id.* at 298-99.

[28] *Donahoe v. Richards*, 38 Me. 376 (1854) (expulsion); *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859) (beating).

[29] Jeffries & Ryan, *supra* note 26, at 299-305; Douglas Laycock, *"Noncoercive" Support for Religion: Another False*

tions, religious instruction in the public schools inflicted precisely "those consequences which the Framers deeply feared." *Abington School District v. Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). The principle of keeping government out of religious controversies now meant that government should not promote religious faith in the public schools.

Deeply rooted anti-Catholicism meant that it took a long time for Americans to recognize this new application of their constitutional principle. But gradually, state courts and local boards of education began removing religious exercises from the public schools.[30] Neither side drew the line between coercion and noncoercion. Those who understood the grievance of religious minorities ended the offending practice. Those who did not acknowledge the grievance felt free to coerce compliance.

Explicit official coercion to participate in school-sponsored religious exercises continued in many places into the mid-twentieth century, when it was finally abandoned under pressure of litigation. The Pennsylvania legislature allowed students to be exempted from prayer and Bible reading in the public schools only after the defendant school district

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Claim About the Establishment Clause, 26 Val. L. Rev. 37, 50-53 (1991) (collecting sources).

[30] *People ex rel. Ring v. Board of Education*, 92 N.E. 251 (Ill. 1910) (holding school-sponsored religious exercises unconstitutional); *State ex rel. Freeman v. Scheve*, 91 N.W. 846 (Neb. 1902) (same); *State ex rel. Weiss v. District Board*, 44 N.W. 967 (Wis. 1890) (same); *Board of Education v. Minor*, 23 Ohio St. 211 (1872) (upholding school board's decision to end school-sponsored religious exercises).

filed its appeal in *Schempp*.[31] Baltimore allowed students to be exempted only after Madalyn Murray threatened her lawsuit.[32] Students in the Miami-Dade case testified to coerced participation despite the school's claim that an unwritten policy had allowed them to be excused.[33]

Reported blasphemy prosecutions continued well past the period of formal disestablishment.[34] States enforced the Christian Sabbath[35] and religious qualifications for voting and office holding.[36] Like beatings and expulsions, these measures were obviously coercive. But noncoercion was not the working principle. The de facto principle was that government could continue with religious practices, coercive or not, that did not arouse substantial Protestant opposition.

D. One way to view this history is to abandon any search for principle and simply say that if Americans in the founding or early national periods did it, it

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[31] *See Schempp v. Abington School District*, 184 F. Supp. 381 (E.D. Pa. 1960); *see also* Stephen D. Solomon, *Ellery's Protest* 29-30, 61-62, 146 (2007) (describing coercion and retaliation against plaintiff Ellery Schempp).

[32] Solomon, *supra* note 31, at 224.

[33] *Id.* at 214-15.

[34] *Commonwealth v. Kneeland*, 37 Mass. 206 (1838); *State v. Chandler*, 2 Harr. (2 Del.) 553 (Ct. Gen. Sess. 1837); *Updegraph v. Commonwealth*, 11 Serg. & Rawl. 394 (Pa. 1824); *People v. Ruggles*, 8 Johns 290 (N.Y. Sup. Ct. 1811).

[35] *E.g.*, *Gabel v. City of Houston*, 29 Tex. 335 (1867); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *City Council v. Benjamin*, 2 Strob. (33 S.C.L.) 508 (Ct. App. 1848).

[36] Morton Borden, *Jews, Turks, and Infidels* 23-52 (1984).

must be constitutional. Such a rule would allow governments to prosecute Jews and Muslims for blasphemy and punish their children for refusing to recite the Christian catechism in public schools. An historical test focused simply on early practices would turn the First Amendment into a Protestant capture, enshrining permanent government preference for the largest religious group at the expense of all the smaller ones. An historical test must be based not just on anything that early Americans did, but on what disestablishment meant to the founding generation in principle.

The principle was that all religions are equal before the law, that government is not a competent judge of religious truth, and therefore, that government should not take sides in religious controversies. This principle better fits early practice, when government was excluded from anything that was religiously controversial among Protestants. Controversies among Protestants got governments out of the business of funding churches and kept Protestant religious instruction in the public schools interdenominational. But other faiths were not numerous enough, or influential enough, to end religious practices, including coercive practices, that preferred Protestants, or sometimes, preferred Christians more generally.

The principle remains the same, but the facts to which the principle applies have changed. The Catholic immigration was followed by Jewish, Muslim, and other immigration streams from around the world, and now by a large increase in the number of Americans with no religion. Government-sponsored religious practices that were uncontroversial in a

world dominated by Protestants, or by Christians, become controversial when 30% of the population is no longer Christian. The principle remains the same: government should not take sides in religious controversies.

When this Court says that government must be neutral between religions, and when Justices of all persuasions agree that government must be neutral at least with respect to those points on which the three Abrahamic religions disagree, the Court and its members are invoking the founding principle that government should stay out of religious controversies. That principle applies to the Bladensburg cross.

III. If the Judgment Is Reversed, It Should Be on a Ground That Does Not Authorize Governments to Sponsor New Crosses.

Petitioners' varied arguments are not limited to the Bladensburg cross, or to existing government crosses more generally. They would permit governments to erect new permanent crosses. And because no other symbol is so theologically freighted as the Latin cross, any other religious symbol would be a lesser included case. Government could endorse disputed and controversial religious teachings at will.

Even if the Court permits the Bladensburg cross to stand, it should not adopt petitioners' expansive rationales. It should not adopt the Commission's desacralizing explanations of the cross. It should not adopt the Legion's untenable coercion test or its vague excessive-proselytizing test. It should not say that governments today can do anything that some

American government did in the eighteenth or nineteenth century.

The only argument for the Bladensburg cross at all connected to Establishment Clause values is that it might be more religiously divisive to take it down than to leave it up. Justices have feared that "disputes concerning the removal of longstanding" religious monuments could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment). Enforcing government neutrality among religions might be misperceived as hostility by those whose religion "benefited" from government sponsorship in the past.

"[C]onstitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). Public misunderstanding or hostility is not a sufficient reason to allow constitutional violations to continue. But it is no reason at all to allow new constitutional violations to begin.

If the Court is unwilling to order the Bladensburg cross removed, it should turn to the bottom line of Justice Breyer's opinion in *Van Orden*. If the Bladensburg cross can remain in place, it is only because, like the Texas Ten Commandments monument, it has been there for many decades.

Some of the reasons Justice Breyer offered for this solution were factually implausible, both in *Van Orden* and here. It is not that the Bladensburg cross is generally perceived as secular. It cannot be so perceived without denigrating the core of Christi-

anity. And although the Ten Commandments have far more secular elements than a cross, the Ten Commandments monument had not generally been perceived as secular either. Nor is it the case that potential challengers have not been intimidated, either in Maryland or in Texas. Counsel of record on this brief was intimidated in *Van Orden*, declining the case to protect his employer, and undoubtedly other potential challengers had been intimidated as well.[37]

The reason for a grandfathering exception would be that to reduce religious divisiveness or protect reliance interests, some surviving vestiges of earlier establishments can remain even as the establishment is ended for the future. This solution was widely adopted when Americans ended their formal establishments. The formerly established churches generally kept the property that they had acquired with government funds.

Virginians debated this issue at length. Most of the Episcopal Church's property had been acquired with public funds, through taxation or land grants, and many dissenters thought this property should return to the state.[38] The ultimate resolution was that the state reclaimed the glebe lands—lands granted to endow support of the clergy—but that the

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[37] Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 Case W. Res. L. Rev. 1211, 1223-26 (2011).

[38] Buckley, *supra* note 15, at 166-69.

church kept its other property without compensating the state.[39]

The situation was more complicated in Massachusetts. Church property was funded by taxes and held in trust for the town or parish, which were units of local government.[40] The voters of the town or parish elected a minister to lead the local church.[41] Bitter religious conflict ensued after Unitarians began winning elections,[42] and the system was repealed in 1833.[43] Each town's religious trust property was given to the denomination that had won the last election.[44] No one reimbursed the towns.

In Connecticut, the formerly established Congregationalists kept the income from "church and glebe lands."[45] New York confirmed all land grants and charters prior to late 1775, including those to the formerly established church.[46] In South Carolina, the formerly established Episcopalians

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[39] *Id.* at 171-72; 1 Anson Phelps Stokes, *Church and State in the United States* 395-96 (1950).

[40] *Baker v. Fales*, 16 Mass. 488, 495-501 (1820).

[41] *Id.* at 508-14; Jacob Conrad Meyer, *Church and State in Massachusetts from 1740 to 1833*, at 174-78 (2012 reprint).

[42] 2 William G. McLoughlin, *New England Dissent* 1196-97, 1207-13 (1971); Meyer, *supra* note 41, at 177-78.

[43] McLoughlin, *supra* note 42, at 1259; Meyer, *supra* note 41, at 217-20.

[44] Meyer, *supra* note 41, at 181.

[45] 1 Stokes, *supra* note 39, at 417.

[46] N.Y. Const. of 1777, art. XXXVI; 1 Stokes, *supra* note 39, at 406.

kept their property by explicit provision of the constitution of 1790.[47] Anson Phelps Stokes surveyed the first fifteen states one by one and did not mention this issue with respect to any of the others.[48] It would obviously have been noteworthy if any other state had reclaimed the property it had provided to the formerly established church; we can safely infer that it never happened. Except for the glebe lands in Virginia, churches were allowed to retain the fruits of their former establishment.

The Bladensburg cross is also the fruit of a former establishment. It was erected at a time when Christians were dominant both numerically and politically, when they were free to exercise that dominance with little thought for religious minorities, and when there was no Jewish congregation in Prince George's County.[49]

But for government to erect such a cross today would be a very different thing, done in conscious disregard of religious minorities that are far more numerous and visible. Few governmental units could erect such a cross today without arousing major controversy. The Utah Highway Patrol Association apparently searched for recent public crosses. Amicus Br. 8-10. It found only a few, and these were mostly small, mostly erected by private organizations, and all erected to memorialize identifiable individuals. It is a reasonable inference that those

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[47] S.C. Const. of 1790, art. VIII §2; 1 Stokes, *supra* note 39, at 434.

[48] 1 Stokes, *supra* note 39, at 366-446.

[49] Brief of Walter Dellinger *et al.* in Support of Neither Side 31-32 & n.30, citing Census Bureau data.

individuals were known to be Christians, or at least reasonably believed to be Christians. Such privately sponsored memorials on government property present an issue of equal access; if a site is opened for private memorials, then privately sponsored crosses can neither be preferred nor excluded. *Cf. Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995).

But for the reasons explained above, government-sponsored Latin crosses are an establishment of religion. They inherently endorse the Christian story of the cross. They proclaim government's belief that Christianity is true, and therefore, that belief in other religions, or in no religion, is necessarily false. No secular rationalization, and no secondary meaning derived from the primary religious meaning, can change the message of this most profoundly religious of symbols. When erected today, government-sponsored crosses tell 30% of the population that government doesn't respect them enough to choose an inclusive symbol for whatever it is trying to accomplish instead of a symbol that is deeply divisive if taken seriously. Perhaps it is religiously divisive to take down longstanding government-sponsored crosses. Certainly it is religiously divisive to put up new ones.

An opinion holding that government-sponsored crosses are not establishments would tempt some governments to erect crosses and some citizens to pressure government to do so. Requiring some secular rationalization would invite attenuated rationalizations, many of them shams. A coercion, excessive-proselytizing, or historic-practice test would not require even a sham rationalization. Government

could endorse its preferred religious teachings and be candid about what it was doing.

Either way, authorization for future government crosses would extend these controversies indefinitely into the future. There would be a political battle over each proposed government cross, and if the cross were erected, there would be litigation.

It would be far better for the Court to take government displays at face value. Governments that display religious symbols or sacred texts should be presumed to endorse the primary religious meaning of that symbol or text. And at least if the symbol or text is that of a particular faith, such an endorsement is unconstitutional. The presumption that government endorses the religious message on the face of its display should be rebutted only if the display is part of a larger secular message, not derivative from the primary religious message, and clearly communicated, with equal or greater prominence, at the site of the display. The Court should not imagine a reasonable observer who is both infinitely informed about, and infinitely accepting of, government rationalizations for displays that are intensely religious on their face.

The Court should hold the Bladensburg cross unconstitutional. But if it upholds this cross, it should not rely on the rationalizations proffered by petitioners. The Court should frankly acknowledge the deeply religious meaning of the cross. If it upholds this cross, it should be solely on the narrow ground that longstanding vestiges of former establishments can sometimes remain.

CONCLUSION

The judgment should be affirmed.

If the judgment is reversed, it should be on a ground that does not authorize governments to erect, purchase, or maintain future crosses.

Respectfully submitted,

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Appendix

The Individual Amici

The American Jewish Committee, a national organization of more than 125,000 members and supporters with 26 regional offices, was founded in 1906 to protect the rights of American Jews. AJC has long believed that one of the most effective ways to achieve that goal is to ensure that all citizens enjoy the equal protection of the laws and equal rights of citizenship.

The Baptist Joint Committee for Religious Liberty has vigorously supported both the free exercise of religion and freedom from religious establishments for all of its eighty years.

The BJC serves fourteen supporting organizations, including state and national Baptist conventions and conferences. It addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.

The Central Conference of American Rabbis (CCAR) is the Reform Rabbinic leadership organization with a membership of more than two thousand Reform rabbis. The CCAR comes to this issue out of our longstanding commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. Religious freedom, and its necessary corollary the separation of church and state, has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been

known anywhere else throughout history.

The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and is the fourth largest Protestant body in the United States. The ELCA has over nine thousand member congregations which, in turn, have approximately 3.7 million individual members. These congregations are grouped into and affiliated with 65 synods that function as the regional organizations of this church body. The ELCA was formed in 1988 by the merger of the Lutheran Church in America, The American Lutheran Church, and the Association of Evangelical Lutheran Churches. The ELCA does not share the theological view described in section I.B. of this brief, i.e., that the cross symbolizes a threat of damnation to unbelievers, but recognizes that some Christians do have that view, and that non-Christians are likely to be aware of that view.

The ELCA and its predecessor denominations have continually supported religious freedom. The ELCA Church Council, the interim legislative authority and board of directors of the church-wide expression of the denomination, adopts social messages to focus attention and action on timely, pressing matters of social concern to the church and society. In 2017, the Church Council of the ELCA adopted a social message on Human Rights, in which it states that the ELCA will "advocate for the U.S. government to protect and promote the equal rights of all people, as enshrined in the U.S. Constitution and Bill of Rights," which include the First Amendment rights of freedom of religion and to be free from government favoritism of one religion over another.

The General Synod of the United Church of Christ is the representative body of the national denomination of the United Church of Christ (UCC). The UCC was formed in 1957, by the union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States, in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has five thousand churches in the United States, with a membership of approximately 944,000.

The General Synod of the UCC, various local churches and regional bodies of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society.

Reverend Dr. J. Herbert Nelson, II, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) (PCUSA) joins this brief as the senior ecclesiastical officer of the PCUSA. The PCUSA is a national Christian denomination with nearly 1.6 million members in

over 9,500 congregations, organized into 170 presbyteries under the jurisdiction of sixteen synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

The words of the 200th General Assembly are key to our understanding of religious expressions in public places. We agree that the display of religious symbols in connection with private speech and assembly in public places is appropriate and legal. However, we oppose the permanent or unattended display of religious symbols on public property as a violation of the religious neutrality required of government. The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.